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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RITA EMERY, VIOLET ATKISSON, LORRAINE BRAGG, and RICHARD WILSON, Plaintiffs/Appellees, v. MISSION VIEW MANAGEMENT, INC., an Arizona corporation; MISSION VIEW PROPERTIES, LLC, an Arizona limited liability corporation; MISSION VIEW COMMUNITIES; and MISSION VIEW CLUB ESTATES, Defendants/Appellants.	2 CA-CV 2009-0104 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20070034

Honorable John E. Davis, Judge

REVERSED

Southern Arizona Legal Aid, Inc.
By Anthony L. Young — Tucson
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and

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Attorneys for Defendants/Appellants

E S P I N O S A, Presiding Judge.

¶1 Mission View Management, Inc.; Mission View Properties, LLC; Mission View Communities; and Mission View Club Estates ("Mission View") appeal from the superior court's grant of summary judgment in favor of plaintiffs Rita Emery, Violet Atkisson, Lorraine Bragg, and Richard Wilson (collectively "the tenants") in their contract action against Mission View arising out of a lease agreement. We reverse.

Factual and Procedural History

¶2 The following facts are undisputed. Mission View owns and manages the Mission View Communities mobile home park. The tenants are residents of the park subject to long-term leases signed in the 1980s. These leases provided that the tenants would be subject to a second contract, the "Declaration of Rules, Regulations and Conditions of the Mission View Club Estates Association," (the Declaration) which pertained to a home owners' association (HOA) that was established to govern and maintain the park. Under the terms of the Declaration, the tenants agreed to pay for the operation and maintenance (O&M fees) of the park through the HOA. The HOA board consisted of Mission View as the sole voting member and a non-voting advisory group. The board was entirely dominated by Mission View; residents were only permitted to serve on the advisory group.

¶3 In 1991, Thomas Schulte purchased Mission View. At that time, the HOA was inactive, but Mission View's previous operator had been collecting monthly O&M fees from the tenants in the HOA's name. Schulte concluded the HOA was illegal because the Arizona Mobile Home Parks Residential Landlord and Tenant Act, A.R.S. §§ 33-1401 to 33-1501 (the Act) required that all residential home parks be maintained by landlords.[1] *See* A.R.S. §§ 33-1434, 33-1452 (landlord must maintain premises and adopt rules and regulations for mobile home park). He began collecting O&M fees directly from the tenants beginning in 1992 and allowed the HOA to lapse. Subsequently, the Arizona Corporation Commission revoked the HOA's charter, officially terminating its existence. In 1997, Schulte transferred his interest in the park to Mission View.

¶4 From 1992 through 1997, the O&M fees gradually increased from approximately $20 per month to approximately $35 per month. The fees then remained constant through 2006 when Mission View increased them to over $108 per month. The tenants objected to the fees and sued Mission View, claiming it had violated their lease agreements by charging them O&M fees directly rather than through the HOA. They

[1]Although in the tenants' answering brief they appear to suggest Schulte's conclusion was incorrect, in the trial court both parties conceded the HOA was illegal under the Act. Because this was not contested below, we do not address it on appeal. *See Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159, ¶ 52, 171 P.3d 610, 622 (App. 2007) (court generally does not consider issues raised for the first time on appeal).

also contested the amount by which Mission View increased the fees, arguing the charges violated A.R.S. § 33-1413(I), and maintained that the fees were unconscionable and not assessed in good faith.

¶5 Both Mission View and the tenants moved for summary judgment. Mission View argued that because the HOA was invalid, the tenants' leases and the Declaration should be construed to give Mission View the ability to directly assess fees necessary for maintaining the premises. In the alternative, Mission View urged that it was entitled to assess O&M fees based on the tenants' failure to have previously objected to the assessments and to prevent an unjust enrichment. The tenants argued that Mission View had no statutory or contractual authority to charge O&M fees and that they had not waived their right to object to them. They also sought "a declaration by the Court as to what legitimate O&M expenses are"[2] and demanded a refund of all O&M fees they had paid Mission View.

¶6 The court denied Mission View's motion for summary judgment and granted the tenants' motion. The court found there were no disputed factual issues and that "the original contracts . . . d[id] not require payments to be made to the landlord for the maintenance and operating expenses." The trial court also appointed a special master

[2]Between 2000 and 2005, some of the tenants had executed documents expressly allowing Mission View to directly collect O&M fees and this requested finding related to their claim that the amount charged was unconscionable and not assessed in good faith.

to determine the proper amount of O&M fees. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B).[3]

Discussion

¶7 We review de novo a grant of summary judgment, construing all facts and reasonable inferences in favor of the party against whom judgment was entered. *See Cannon v. Hirsch Law Office, P.C.*, 222 Ariz. 171, ¶ 36, 213 P.3d 320, 331 (App. 2009). "[S]ummary judgment is improper if, upon examination of the entire record, it may be determined that there is a disputed fact which, if true, could affect the final judgment." *Wagner v. City of Globe*, 150 Ariz. 82, 83, 722 P.2d 250, 251 (1986), *disapproved on other grounds, Demasse v. ITT Corp*., 194 Ariz. 500, 984 P.2d 1138 (1999). "[E]ven where the facts are undisputed, summary judgment is not proper if the evidence is of such a character that reasonable minds could draw different conclusions or inferences therefrom." *Id*. Additionally, we review a trial court's interpretation and construction of a contract de novo. *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, ¶ 11, 87 P.3d 81, 83 (App. 2004).

[3]Both parties correctly note that even though Mission View is located on the Tohono O'odham Indian Reservation, this court may properly exercise jurisdiction over this dispute. *See Kuykendall v. Tim's Buick, Pontiac, GMC & Toyota, Inc*., 149 Ariz. 465, 466-68, 719 P.2d 1081, 1082-84 (App. 1985) (state courts have jurisdiction to enforce lease on tribal lands not involving tribal members).

¶8 Mission View first appears to argue that the Act compels "[t]he Multi-Year Leases [to] be construed as requiring the landlord to maintain the premises and the tenants to remit O & M fees to the landlord."[4] But Mission View has not cited any part of the Act, or any other authority, for that matter, requiring a landlord to charge or a tenant to pay for every expense associated with the property, nor has it noted any provision allowing a landlord to collect fees not enumerated in a lease. We note that the invalidation and abandonment of the HOA provision appears to create significant ambiguities as to the contracting parties' intentions; Mission View, however, has not argued below or on appeal that any question of fact exists that would bar summary judgment. *See Burkons v. Ticor Title Ins. Co. of Cal.*, 168 Ariz. 345, 351, 813 P.2d 710, 716 (1991) (parties' intent a fact question). In any event, we need not resolve whether the trial court properly interpreted the contracts because it clearly erred in its summary disposition of Mission View's equitable claims.

¶9 Regardless of whether the trial court correctly ruled on the contract issue, reversal is nonetheless required because the court erred in granting summary judgment on two claims that were not predicated solely on the operation of the original contract language. During proceedings on the parties' cross-motions for summary judgment,

[4]Mission View devotes a substantial portion of its brief to discussing the Act, apparently to argue that the HOA provisions of the Declaration are unenforceable. But, as the trial court noted, neither party disputed below that the HOA was invalid and because we resolve this case on other grounds, we need not address this issue.

Mission View argued the doctrine of waiver as well as the equitable remedy of unjust enrichment. The court acknowledged these two arguments, but did not specifically rule on them in its initial grant of summary judgment. After Mission View filed a motion for reconsideration based on the court's apparent failure to address the unjust enrichment argument, the court issued a supplemental ruling stating "the basis for the [initial] ruling remain[ed]" sound. A finding based on the original contract language, however, could not operate to dispose of Mission View's arguments regarding waiver and unjust enrichment, neither of which was grounded in the original contract language.

¶10 Whether a right has been waived is a question of fact. *N. Ariz. Gas Serv., Inc. v. Petrolane Transp., Inc.*, 145 Ariz. 467, 476, 702 P.2d 696, 705 (App. 1984). When all the facts presented "compel but one conclusion or inference," "it is the duty of the court to determine the law therefrom." *Wasson v. Smith*, 19 Ariz. 431, 436, 171 P. 995, 997 (1918). The facts in this case do not compel one result. Rather, reasonable persons could differ as to whether, by paying the landlord O&M fees for over fifteen years in return for operation and management services, the tenants intentionally waived their rights to object to the fees they had already paid as well as those that may be assessed in the future. Therefore, the trial court erred in granting summary judgment on this issue. *See United Cal. Bank*, 140 Ariz. at 266-68, 681 P.2d at 418-20 (trial court properly considered as fact question parties' behavior in determining whether first loan agreement intended as part of integrated contract); *see also Republic Ins. Co. v. Feidler*,

178 Ariz. 528, 534, 875 P.2d 187, 193 (App. 1993) ("When competing reasonable inferences may be drawn from the undisputed facts, summary judgment should not be granted.").

¶11 Similarly, the equitable claim of unjust enrichment cannot depend on the court's interpretation of a contractual provision. *See Stapley v. Am. Bathtub Liners, Inc.*, 162 Ariz. 564, 568, 785 P.2d 84, 88 (App. 1989) (unjust enrichment is a claim in equity); *see also Double AA Builders, Ltd. v. Grant State Constr. L.L.C.*, 210 Ariz. 503, ¶ 45, 114 P.3d 835, 843-44 (App. 2005) (equitable remedies distinct from contract remedies). Although we generally assume a trial court made all necessary findings to support its decision, *see Mathews ex rel. Mathews, v. Life Care Ctrs. of Am., Inc.*, 217 Ariz. 606, ¶ 21, 177 P.3d 867, 872 (App. 2008), here the court specifically stated it had based its ruling on this issue on the language of the original contract. To prove unjust enrichment, a party must show an enrichment, an impoverishment, a connection between the enrichment and impoverishment, the absence of justification for the enrichment and the impoverishment and "the absence of a legal remedy." *Trustmark Ins. Co. v. Bank One, Ariz., NA*, 202 Ariz. 535, ¶ 31, 48 P.3d 485, 491 (App. 2002).

¶12 The tenants rely on *Trustmark* for the proposition that unjust enrichment is unavailable when the parties' relationships are governed by a contract. 202 Ariz. 535, ¶ 34, 48 P.3d at 492. But in *Trustmark* this court held that unjust enrichment was unavailable when the party asserting it could have sought relief under a breach of contract

theory. *Id*. In doing so, we distinguished situations in which a party's obligation arose out of contract as distinct from those in which unjust enrichment was argued in the alternative and the invalidation of a disputed contract would eliminate "a remedy at law to recover payment for the services . . . rendered." *Id*. ¶ 36.

¶13 Here, Mission View's primary argument is that the Declaration has always required the tenants to reimburse the landlord for operation and maintenance expenses. It argued in the alternative that if the court were to accept the tenants' arguments and the contract did not require reimbursement and was invalid, there would be no contractual right to recover operation and management expenses and the tenants would have been unjustly enriched. *See Baierl v. McTaggart*, 629 N.W.2d 277, 286-87 (Wis. 2001) (Crooks, J., concurring) (despite determination that illegal provision rendered lease invalid, nothing prevented landlord's recovery in quantum meruit). Accordingly, Mission View might have a viable claim based on unjust enrichment that could be applicable in this case. *See id*. And because no valid agreement would govern the payment of these costs, the invalid contract provision could serve as evidence Mission View did not gratuitously undertake the operation and maintenance costs, which it could have legally included as rent in the tenants' leases, thus creating an issue of fact to defeat summary judgment. *See Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz. 48, 54, 703 P.2d 1197, 1203 (1985) (provisions of invalid contract demonstrated party seeking restitution had reasonable expectation of payment for services rendered). Because this

unjust enrichment claim did not rely on the contract, it is clear the trial court erred as a matter of law when it relied on the leases to decide this issue.

Disposition

¶14 For the foregoing reasons, we reverse the grant of summary judgment and remand this case to the trial court for further proceedings consistent with this decision.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

GARYE L. VÁSQUEZ, Judge